

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

IN THE MATTER OF THE)	SUMMARY OF FACTS AND
COMPLAINT AGAINST)	STATEMENT OF FINDINGS
JERRY L. MOORE,)	
CANDIDATE FOR MAYOR OF DARBY)	

Two complaints, the first by Ray D. Higgins and the second by Sue Robinson Harper, were filed with the Commissioner of Political Practices on October 15th and 18th, 1993. These complaints allege that a violation of section 13-35-234, Montana Code Annotated (MCA), occurred when Jerry L. Moore distributed a flier within the community of Darby. This flier is alleged to have contained statements of a false nature reflecting on the character or morality of Richard A. Higgins, the incumbent seeking re-election to the office of Mayor of Darby.

Section 13-35-234, MCA, provides as follows:

13.35.234. Political criminal libel--misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

The results of an investigation of the alleged violation are set forth in the summary of facts that follows.

SUMMARY OF FACTS

1. Richard A. Higgins, incumbent Mayor of Darby, is opposed in this November 2, 1993 election by Mrs. Jerry L. Moore, challenger.

2. Fliers distributed within the community by Mrs. Moore and those assisting in her campaign were placed at residences on the afternoon of October 13, 1993 and the evening of October 14, 1993.

3. The complaints allege the material on the fliers to be false, reflecting unfairly the character or morality of Richard A. Higgins. The wording on the flier in question has six numbered statements as follows:

"Do You Want a Mayor That!

- 1) was convicted in July 22, 1990- for allowing gambling credits.
- 2) was convicted in May 16, 1991- for making and distributing gambling devices with no license.
- 3) was convicted for failure to obtain a town business license in 1991.
- 4) was convicted for failure to obtain an alcoholic beverage retailers license in 1991.
- 5) had his water shut off by the city of Darby for failure to pay his delinquent water bills for his laundromat in October 1990.
- 6) has a private agenda against the local law enforcement of Darby.

The flier concludes with the following:

CONCERNED ABOUT THE NEXT FOUR YEARS ? DARBY NEEDS A NEW
MAYOR NOW! VOTE YES JERRY MOORE FOR MAYOR

Paid for by the Jerry Moore for Mayor Committee Teri Lien,
Chairman, Pearl Harrsch Treasurer.

Complainant Ray D. Higgins states that each of the six
numbered statements is wrong.

4. The flier was created by Mrs. Jerry L. Moore and
distributed at her direction.

5. A notice to appear and complaint issued by the Darby
Police Department cited violations for failure to obtain a valid
town business license and for failure to obtain an alcoholic
beverage retailer's license from the town of Darby. These two
notices were dated April 14, 1991 and signed by Officer Larry Rose.
Judge Tom Drinville fined Richard Higgins \$35.00 for these
infractions.

6. A notice to appear and complaint were issued by the
Department of Justice to Richard A. Higgins for the 22-31 days of
July, 1990 for extending credit for money used by N. Koerber in
video gambling machine play. Citations for violations were issued
to Richard A. Higgins. Richard A. Higgins failed to appear for
trial on February 26, 1992 and \$300 bond was ordered forfeited in
the court of Judge Sabo.

7. A notice to appear and complaint were issued by the
Department of Justice to Richard Alan Higgins on May 16, 1991 for
supplying video gambling machines at Cantina Cacocina without a

valid distributor's license. Judge Nancy Sabo fined Richard A. Higgins with \$350 collected on the complaint.

8. Disposition of these complaints resulted in fines, and/or forfeitures. Verification of these complaints resulted in statements by officials involved who stated they believed there were convictions even though no formal trial was held. City Judge Martha Bethel, and Wayne Capp, investigator for the Department of Justice, both verified their belief that convictions resulted from these official actions, Bethel for the town complaints and Capp for the Department of Justice complaints.

9. City water was shut off to the Darby Laundry Center, owned by Richard A. Higgins, in September or October 1990, at the order of then Mayor Moody. The city council considered prosecution of theft of service charges but did not pursue it.

STATEMENT OF FINDINGS

Section 13-35-234, MCA, quoted in full on page one, is Montana's political criminal libel statute. The portion of the statute relevant to this case makes it ". . . unlawful for any person to . . . make or publish any false statement or charge reflecting on any candidate's character or morality. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor."

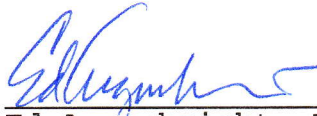
A violation can be established through proof of alternative mental states. The statute requires proof that a person publishing

statements does so "knowingly" or "with reckless disregard" as to the truth of the representation. (Matter of the Complaint Against Jack Rea, Summary of Facts and Statement of Findings, May 10, 1991, at 13-14.) Thus, to establish a violation it would be necessary to prove either that the person who made the representation was "aware of a high probability" that the representation was false or that the person in fact "entertained serious doubts as to the truth" of the representation. (Id. at 13-16.)

Moore, in creating the flier in question appears to have believed that the complaints resulting in forfeitures and fines did, in fact, result in convictions. Officials, when questioned, verified that, while no jury trials were held, the forfeitures and fines were tantamount to convictions for the named individual, Richard A. Higgins. The questions of ownership of the business, or where the forfeited money came from, have no bearing on the issue of this complaint. The issue is "Did Jerry Moore knowingly publish false statements?" In view of the facts of this investigation I must conclude that Jerry Moore did believe and had reason to believe that the statements in the flier were true. Evidence is insufficient to conclude that the representation was made with the mental state required by the statute. The issue of a private agenda against local law enforcement is a matter of opinion and is a statement about a campaign issue that candidates can rightfully bring to the attention of the voters.

Based on the facts and these findings, I conclude that no further action is warranted against Jerry Moore.

Dated this 1st day of November, 1993



Ed Argenbright, Ed.D.
Commissioner of Political Practices